

The issue raised on appeal is whether claimant provided timely notice of his alleged accidental injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed for respondent as a pallet puller. Claimant testified that on or about July 11, 2011, due to the wrap machine not working, he was wrapping a pallet by hand when he tripped over some debris on the floor and fell on his hip and buttox. He felt a sharp pain in his lower back and left hip. Claimant reported the accident the same day to a floor supervisor, Meko. Claimant testified that Meko was his immediate supervisor.

Q. When you told Meko about your accident, did he offer to send you for any medical treatment at that time?

A. No.

Q. Did he offer you any documentation to fill out at that time?

A. No.<sup>1</sup>

About an hour later claimant also told Jerome, another foreman floor supervisor, about the accident. Jerome did not send claimant for any medical treatment nor did he provide claimant with any documentation to fill out. Claimant testified that his actual supervisor, Benjamin Ortega, was not present on the day of the accident.

Claimant began working for respondent on May 15, 2011, but he had also worked for respondent a couple of months previously. When first employed by respondent claimant attended orientation which included how to report an injury. And when asked what the procedure was for reporting a work-related accidental injury the claimant responded that the accident must be reported to the immediate supervisor. Claimant testified:

Q. Did you get a handbook as far as your employment?

A. Yes.

Q. Was there a section in the handbook about reporting Workers' Compensation injuries?

A. Yes.

---

<sup>1</sup> P.H. Trans. at 10-11.

Q. Was there paperwork that you filled out and signed indicating that you had read that handbook and you were aware of what was contained therein?

A. Yes.

Q. Including the section on how to report a Workers' Compensation injury?

A. Yes.<sup>2</sup>

On cross examination, claimant testified that his supervisor was Benjamin Ortega.

Q. In the materials you received about reporting Workers' Compensation injuries, did it indicate that you were to report those injuries to your actual supervisor?

A. Yes.

Q. And your actual supervisor was Benjamin Ortega?

A. Yes.

Q. On your direct testimony I didn't hear you mention that you reported this injury to Benjamin?

A. No.

Q. Did you report this injury to Benjamin?

A. No.<sup>3</sup>

On July 28, 2011, claimant sought treatment on his own at the Spinal Institute in Topeka, Kansas. Claimant testified that the reason he waited so long to seek medical treatment is because he thought it would get better on its own. Claimant received non-surgical spinal decompression. Claimant testified that the treatment helped his back but didn't permanently resolve his problems.

On July 29, 2011, claimant met with Angie Simmons in respondent's human resources. The purpose of the meeting was to discuss the alleged work accident. Claimant told Ms. Simmons that he may have suffered an accident and injury approximately two weeks ago. Ms. Simmons told claimant he needed to meet with his supervisor pursuant to respondent's procedure. Claimant noted he did not meet with his

---

<sup>2</sup> P.H. Trans. at 18.

<sup>3</sup> *Id.* at 20.

supervisor because Ms. Simmons wanted an exact date of accident. Claimant, Ms. Simmons and a witness, then signed a document dated July 29, 2011, which provided:

I, Adam Ferguson, spoke with Human Resources regarding the correct accident reporting procedures for an alleged incident that may have occurred 2 weeks ago. I was informed to fill out an accident report with my Supervisor and Reser's Fine Foods would contact AMR for medical treatment and review any incident that may have occurred.

I understand that by failure to appropriately report the injury, I am declining medical treatment through workman's compensation. I have stated that I, Adam Ferguson, am going to figure this out on my own through personal means. I have been informed that failure to follow workman's compensation procedures may result in a denial of a workman's compensation claim.<sup>4</sup>

Claimant testified that because he failed to report the injury correctly, he was told he could be terminated or written up for not following procedure. So he signed the paper saying that he did not want medical treatment through workers compensation in order to keep from being terminated.

On July 29, 2011, claimant sought medical treatment at St. Francis Hospital's emergency room. He told the nurse that he was wrapping a pallet by hand when he tripped over debris and fell. But before claimant received treatment he had to leave due to an emergency.

The 2011 legislative session resulted in amendments to the workers compensation act including amendments to the requirements for an injured employee to provide the employer notice of an injury by accident or repetitive trauma. L. 2011, Ch. 55, Sec. 16 provides:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates: (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma; (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

---

<sup>4</sup> P.H. Trans., Resp. Ex. A.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager. (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer. (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Under the record compiled to date, the claimant's supervisor, Mr. Ortega, was allegedly designated as the individual to whom oral notice of accidental injury must be given. And claimant agreed that he never provided Mr. Ortega with notice of his alleged accidental injury. However, the statute now requires that the employer must designate an individual by name to whom notice must be given. In this case it appears the requirement was simply to notify an individual with the title of supervisor. And claimant did provide oral notice of his accident to two floor supervisors on the date of accident.

But the statute further provides that notice may be provided in writing. And in this case a written document was provided to respondent's human resource department on July 29, 2011, as evidenced by the document signed by claimant and Ms. Simmons. And that document clearly indicated the purpose of the meeting was to discuss the procedure to report an accident that occurred two weeks before the meeting. This Board Member is mindful that the second paragraph of the written document contains a statement that claimant was declining medical treatment through workers compensation but claimant's uncontradicted testimony was that he signed under the threat of termination. This Board Member finds that the written document signed and delivered to respondent's human resources constituted timely written notice of the alleged accidental injury. Accordingly, the ALJ's Preliminary Hearing Order is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca A. Sanders dated December 21, 2011, is reversed and the matter remanded to the ALJ for the determination of the remaining issues.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2012.

---

HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: David A. Slocum, Attorney for Claimant  
Jeffrey A. Mullins, Attorney for Respondent and its Insurance Carrier  
Rebecca A. Sanders, Administrative Law Judge

---

<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2010 Supp. 44-555c(k).